

GAHC010155862019



**THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Case No. : C.Ex.App. 12/2019**

1:COMMISSIONER, GST AND CENTRAL EXCISE,  
GST BHAWAN, KEDAR ROAD, FANCY BAZAR, GUWAHATI-1.

VERSUS

1:M/S BSNL  
PANBAZAR, GUWAHATI-1.

**Advocate for the Petitioner : MR. S C KEYAL**  
**Advocate for the Respondent : MR. V K CHOPRA**

**BEFORE**  
**HONOURABLE MR. JUSTICE SUMAN SHYAM**  
**HONOURABLE MR. JUSTICE HITESH KUMAR SARMA**

**JUDGMENT & ORDER (ORAL)**

**Date : 12-02-2020**

**Suman Shyam, J**

Heard Mr. S.C. Keyal, learned ASGI appearing for the appellant. We have also heard Mr. V.K. Chopra, learned counsel appearing for the respondent.

2. The judgment and order dated 13-12-2018 passed by the learned Customs, Excise & Service Tax Appellate Tribunal (CESTAT), Eastern Zonal Bench, Kolkata in ST Appeal No. 198/2008 and ST Appeal No. 210/2008 have been assailed by the appellant in this appeal

filed under Section 35G of the Central Excise Act, 1945.

3. At the very outset, it would be apposite to mention herein that by filing only one appeal, the appellant has assailed the common judgment and order dated 13-12-2018 of the learned CESTAT disposing of both the appeals pending before it. However, taking note of the submission of Mr. Chopra that he would have no objection if the appellant is allowed to assail the common judgment and order passed by the learned CESTAT by filing a composite appeal, the issue of maintainability of the appeal stands resolved and therefore, we proceed to dispose of the appeal on merit.

4. The facts leading to the institution of the appeal, briefly stated, are as follows:-

The Finance Act, 1994 had introduced the provision for realizing service tax. Accordingly, some of the services provided by the Secondary Switching Area (SSA) under the BSNL fell within the purview of the Act of 1994 and therefore, were liable to be taxed @ 5% on gross receipt. On 28-03-2003, the Deputy Commissioner, Central Excise, Guwahati had issued a Show Cause notice addressed to the respondent Bharat Sanchar Nigam Limited (BSNL), Assam Circle, Guwahati and four of its SSAs demanding a sum of Rs. 3,47,49,000/- being the shortfall of service tax recoverable from the department in terms of Section 73(a) of the Finance Act, 1994 as well as for realization of interest and penalty as per the provision of the said act. In the Show Cause notice dated 28-03-2003, it has been, *inter alia*, projected that the respective SSAs had failed to pay service tax on the "gross receipt" charged by the service providers.

5. The sum of Rs. 3,47,49,000/- pertains to the demand of service tax for the period

from 01-12-1997 to 31-03-2000 in respect of the four SSAs named therein. Upon receipt of the notice dated 28-03-2003, the respondent filed reply denying the liability. Thereafter, the matter was taken up for adjudication and by the order dated 28-08-2008 passed by the Commissioner, Central Excise, Shillong, the proceeding was disposed of by confirming the demand of recovery of tax to the extent of Rs. 2,77,65,000/-. By the order dated 28-08-2008, the Commissioner of Central Excise had also imposed penalty of Rs. 2,77,65,000/- upon the respondent by invoking the jurisdiction under Section 74 of the Finance Act, 1994. Thus, the original demand of Rs. 3,47,49,000/- raised in the Show Cause notice dated 28-03-2003 was reduced by the Commissioner to Rs. 2,77,65,000/- for the reasons recorded in the order. But at the same time, heavy penalty of equal amount was also imposed upon the respondent.

6. The operative part of the order dated 28-08-2008 is reproduced herein below for ready reference:-

*“ORDER*

*6.1 Having regards to above discussion and findings, I order confirmation of the demand and recovery of service tax of Rs. 2,77,65,000.00 (Rupees two crore seventy seven lakh sixty five thousand only) from M/s BSNL, Assam Circle, Guwahati in terms of section 73(1)(a) of the Finance Act, 1994.*

*6.2 I order recovery of interest at the appropriate rate in terms of section 75 of the Finance Act, 1994.*

*6.3 I impose penalty of Rs. 2,77,65,000/- (Rupees two crore seventy seven lakh sixty five thousand only) on M/s BSNL, Assam Circle, Guwahati in terms of section 78 of the Finance Act, 1994”*

7. Aggrieved by the order dated 28-08-2008, the respondent had preferred ST Appeal

No. 198/2008 before the CESTAT. Simultaneously, the appellant had also preferred ST Appeal No. 210/2008 assailing the order dated 28-08-2008 to the extent of reduction of the original demand raised in the Show Cause notice dated 28-03-2003.

8. After hearing the arguments advanced by the learned counsel for both parties, the learned CESTAT had disposed of both the appeals by the impugned judgment and order dated 13-12-2018 thereby setting aside the order passed by the Commissioner of Central Excise and allowing the appeal filed by the respondent. There is, however, no mention in the said order as to the fate of the appeal preferred by the appellant. Aggrieved thereby, the present appeal has been filed.

9. This appeal was admitted by the order dated 22-11-2019 to be heard on the following substantial questions of law:

*“Whether the appellant court was correct in accepting the contention of the respondent BSNL that service tax is leviable on the actual receipts and not the gross receipts.”*

10. Mr. Keyal, learned ASGI has argued that confusion, if any, in the Show Cause notice dated 28-03-2003 was created purely on account of non-cooperation of the BSNL authorities inasmuch as, when the assessing officers had examined the books of account and records so as to assess the actual taxable receipt of the services coming under the purview of Finance Act, 1994 for the purpose of recovery of service tax, such documentary evidences were not made available to the officials so as to correctly assess the amount of taxable receipt. However, submits Mr. Keyal, even if it is assumed that the Show Cause notice dated 28-03-2003 had raised erroneous demand, even then, the learned CESTAT did not have the jurisdiction to carryout assessment of the taxable

component on its own and thereafter, set aside the claim of the department. In any event, submits Mr. Keyal the department was entitled to recover service tax on the gross receipt on account of taxable services and therefore, the demand cannot altogether be held to be illegal.

11. Responding to the said submission, Mr. Chopra, learned counsel for the respondent has argued that the provision of Finance Act, 1994 makes it amply clear that the service tax can be levied only on such items that have been held to be taxable. He submits that Section 65 of the Act of 1994 has defined "taxable services" and therefore, no service tax can be recovered in respect of gross receipt on account of any service which is not included within the definition of "taxable service". It is also the submission of Mr. Chopra that by clubbing the assessment of different SSAs and by juggling the figures, the appellant had raised an erroneous demand in the Show Cause notice dated 28-03-2003 by including such items in the "gross receipt component" which were exempted from taxable services. The said error was rectified by the learned Tribunal by carrying out reconciliation of the account whereby, it was found that no further amount was payable by the respondent. Under the circumstances, submits Mr. Chopra, no interference is called for with the impugned judgment and order dated 13-12-2018.

12. We have gone through the materials available on record and have also bestowed our anxious consideration on the submission made by the learned counsel for both the parties.

13. As noticed above, the Central Excise Department had issued Show Cause notice dated 28-03-2003 raising a demand of Rs. 3,47,49,000/- on account of default allegedly

made by as many as four different SSAs viz. M/s Guwahati SSA, M/s Jorhat SSA, M/s Silchar SSA and M/s Nagaon SSA. From a perusal of the Show Cause notice, it is evident that each of the four SSAs were maintaining separate accounts of "gross receipts" and the demand of the Central Excise Department also pertains to the individual SSAs based on the records maintained by them. However, there is no indication in the Show Cause notice dated 28-03-2003 as to what was the amount recoverable against each SSA. The Show Cause notice dated 28-03-2003 also fails to give specific particulars as to the gross receipts of the respective SSAs which were found to be taxable. From the Show Cause notice dated 28-03-2003, it is not possible for this Court to infer that the "non-taxable services" had been excluded from gross receipts for the purpose of computing the tax component. On the contrary, it appears that the demand pertaining to those four SSAs had been clubbed together and the Show Cause notice has been served upon the Chief General Manager, BSNL, Assam Circle, Guwahati on a lump sum basis merely because he happens to be the apex administrative authority of the BSNL for the Assam Circle.

14. What is to be noted herein is that in the Show Cause notice dated 28-03-2003, the Central Excise Department is alleging evasion of service tax and is also seeking to realize interest besides levying penalty. There is no dispute about the fact that for the purpose of recovering service tax, each SSA was to be treated as an independent entity. Therefore, it was incumbent upon the department to furnish SSA wise specific particulars of the default so as to enable the noticee to suitably respond to the allegation brought against it. However, as noticed above, specific facts and figures relatable to each of the SSAs have not been mentioned in the notice dated 28-03-2003.

15. From the order dated 28-08-2008, we also find that the Commissioner of Central Excise had confirmed the demand by reducing the amount from Rs. 3,47,49,000/- to Rs. 2,77,65,000/- but such reduction is merely on account of exclusion of claim of service tax on account of GMT, Silchar and GMT, Jorhat for the period from 01-12-1997 to 30-06-1999. Save and except the above, there is no adjudication as to whether, the demand of Rs. 3,47,49,000/- is on the basis of gross receipt on account of "taxable services" or it includes the entire gross receipt of SSAs including the "non-taxable services".

16. A perusal of the impugned judgment and order dated 13-12-2018 passed by the learned CESTAT also goes to show that in order to figure out the liability of the respondent, the learned Tribunal had carried out re-conciliation of the account of the respondent and determined the amount of service tax actually payable by it. Thereafter, the CESTAT came to a conclusion that although there is short payment of service tax to the extent of Rs. 52.88 Lakh yet, the BSNL had voluntarily made excess payment of service tax to the extent of Rs. 74.20 Lakh. As such, no more service tax was payable. The operative part of the order dated 13-12-2018 is reproduced herein below for ready reference:

*"12. Out of the total gross receipts, the amounts, which are not liable to service tax are to be excluded. After the said deduction, we note that BSNL, during relevant time, had short paid service tax to the extent of about Rs. 52.88 lakhs. However, it is also seen that BSNL has sou-motu made payment of such differential service tax of Rs. 74.20 lakhs. As such, no more service tax is required to be paid.*

*13. Revenue has filed the present appeal challenging the amount of service tax dropped by the adjudicating authority. On the basis of re-calculation of service tax dues and submission of a Certificate from the independent Chartered Accountant, we are led to the conclusion that the correct service tax liability has been arrived at and settled by BSNL.*

*14. In view of the above, we are of the view that the impugned order is not sustainable and we set aside the impugned order and allow the appeal filed by M/s BSNL."*

17. From a careful analysis of the impugned order dated 13-12-2018, we find that the learned CESTAT had carried out the assessment of the service tax payable by the department on the basis of re-conciliation of the account produced before it for the first time by the BSNL and thereafter, upon obtaining certificate from an independent Chartered Accountant, it has determined the service tax component payable by the respondent. In other words, by the impugned order dated 13-12-2018, the learned CESTAT had for the first time carried out assessment of the tax liability of the respondent on the basis of the documents and records made available before it and thereafter, arrived at a conclusion that the impugned order dated 28-08-2008 was not sustainable in law.

18. Section 35C of the Central Excise Act, 1944 confers jurisdiction upon the Appellate Tribunal to pass such orders which are indicated therein, including orders confirming, modifying or annulling the decision or order appealed against. However, Section 35C of the Act of 1944, does not confer any jurisdiction upon the learned Tribunal to carryout assessment of the tax liability and records its own conclusion on that behalf. Thus, a function which has to be left to the assessing authorities had been undertaken by the learned CESTAT in a manner, which in our opinion was, impermissible in law, more so, when such an exercise was not attempted even by the Commissioner of Central Excise. Moreover, no justification whatsoever has been offered in the impugned order dated 13-12-2018 as to the reason why the appeal preferred by the appellant herein was rejected.



19. Although, we are in agreement with the submission of Mr. Chopra that the impugned Show Cause notice suffers from certain vital deficiencies, yet, we are also of the view that learned CESTAT was not correct in carrying out an independent assessment of the tax liability of the respondent and thereafter, recording a finding of fact by obtaining certificate from a Chartered Accountant.

20. For the reasons stated above, the impugned order dated 13-12-2018 is held to be unsustainable in the eye of law and the same is accordingly, set aside. The Show Cause notice dated 28-03-2003 also stands interfered with.

21. We, however, make it clear that notwithstanding this order, it will be open for the appellant to issue fresh Show Cause notice raising demands for recovery of service tax as may be permissible under the law. Such demand, if any, raised by the appellant, shall clearly specify and exclude the "non-taxable" services from the gross receipt and also indicate the period as well as the particulars of the SSA to which the same relates to.

Upon receipt of such notice, it will be open to the respondent to avail all procedural safeguards as may be permissible under the law. We also make it clear that the order dated 28-08-2008 shall cease to have any effect in the matter.

With the above observation, this appeal stands disposed of.

**JUDGE**

**JUDGE**

GS

**Comparing Assistant**